U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 25 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The AAO dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reconsider. The AAO will dismiss the motion.

The petitioner filed the Form I-140 petition on December 29, 2011, seeking classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as the Texas state program director for a non-partisan community organization. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. Section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i), provides for such a waiver. The director denied the petition on August 28, 2012, having found that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The petitioner appealed the denial to the AAO, which dismissed the appeal on December 21, 2012. The petitioner has filed a timely motion to reconsider the AAO's decision.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion, counsel contends that the AAO failed to consider properly submitted evidence. The present decision will not repeat the discussion from the AAO's December 2012 decision.

The petitioner's motion concerns the director's issuance of a request for evidence (RFE) on April 3, 2012, and the petitioner's subsequent responses to the RFE. The original RFE, as reproduced in the record, allowed the petitioner 30 days to respond. The petitioner, through counsel, responded during that period, stating:

> Please accept this submission as a partial response to the RFE you issued on April 3, 2012. Regulations allow for partial responses to RFEs. 8 C.F.R. § 103.2(b)(11).
>
> [The petitioner] will be submitting several more letters of support from political representatives, evidencing his influence on the field of advocacy and organization. Those letters will be submitted within one week.

In dismissing the petitioner's appeal on December 21, 2012, the AAO quoted the complete regulation at 8 C.F.R. § 103.2(b)(11):

> In response to a request for evidence or a notice of intent to deny, and within the period afforded for a response, the applicant or petitioner may: submit a complete response containing all requested information at any time within the period afforded;

> submit a partial response and ask for a decision based on the record; or withdraw the benefit request. All requested materials must be submitted together at one time, along with the original USCIS request for evidence or notice of intent to deny. Submission of only some of the requested evidence will be considered a request for a decision on the record.

The above regulation does not permit a staggered response to an RFE; "[a]ll requested materials must be submitted together at one time." Also, the USCIS regulation at 8 C.F.R. § 103.2(b)(8)(iv) states: "Additional time to respond to a request for evidence . . . may not be granted."

After stating on May 4, 2012 that a supplemental RFE response would follow "within one week," the petitioner mailed the supplemental response almost two months later, on June 28, 2012. That response included no explanation for the delay. The director, in the denial notice, gave consideration to the petitioner's first, timely response to the RFE, but not to the supplemental response.

On motion, the petitioner demonstrates that the director issued two versions of the RFE, both dated April 3, 2012. The first version, the only one previously in the record, allowed a 30-day response period. The second version, documented for the first time on motion, allowed 84 days. Counsel asserts that the petitioner submitted the supplemental response during that 84-day period, and therefore the director (and the AAO) should have considered it.

Counsel states: "[t]he AAO, of course, heedlessly flouted the existence of two RFE letters." Prior to the filing of the motion, the record contained no evidence that the director had issued two RFEs, both dated April 3, 2012, with two different response periods. The petitioner's second RFE response from June 2012 did not include a copy of the 84-day version of the RFE, and counsel's statement from that submission did not mention that version. The AAO issued its decision without knowledge of the 84-day RFE. Regardless, the regulation at 8 C.F.R. § 103.2(b)(11) permits a partial response, but requires that "all requested materials must be submitted together at one time." Therefore, the petitioner's motion does not establish that the AAO's initial decision was incorrect based on the evidence of record.

Because the 84-day RFE was not previously in the record, the AAO will, here, consider the materials submitted in the petitioner's supplemental response to the April 2012 RFE. That response comprised a supplemental brief, three witness letters, and copies of articles from various online newspapers and magazines.

The petitioner submitted the articles "as Evidence of the Key Role Texas Currently Plays on the [redacted]." The articles discussed the growing proportion of eligible Latino voters in Texas, and low turnout among those voters; controversial laws requiring voters to possess photographic identification; error-ridden purges of registered voters. The articles establish the existence of the trends that the petitioner seeks to address. Counsel does not claim that the articles mention the petitioner.

In the brief, counsel stated: "The Service must not judge the significance of [the petitioner's] services to the nation on an *absolute* basis, but rather, on his *relative* stature vis-à-vis other Latino rights advocates. On this basis, it is clear that [the petitioner] has influenced the advocacy field for Latino rights to a 'significantly greater degree.'" (Emphasis in original.)

The assertion that the petitioner has greater stature than his peers is not a sufficient basis for approving the national interest waiver. The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. Exceptional ability, in turn, does not ensure approval of the waiver, because aliens of exceptional ability are subject to the statutory job offer requirement at section 203(b)(2)(A) of the Act. The petitioner's "relative stature vis-à-vis other Latino rights advocates" does not necessarily translate into influence on the field. Even then, the record contains no objective evidence to support claims of that "relative stature." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The first witness letter in the supplemental RFE response is from executive director of the who stated:

> Research has shown that developing grassroots community leaders is a critical necessity for increasing civic participation and voting in historically disengaged communities. . . . We must focus in areas where voters have been traditionally excluded and marginalized. . . . [Voter engagement] programs need to be culturally sensitive to be effective.
>
> . . . Texas was ranked 50th in voter turnout in 2010, a rate of 32.9% of the eligible voting population. . . . The state's Hispanic population increased from 32% in 2000 to 37% in 2010; however, they only made up about 20% of the 2008 Texas electorate.
>
> Furthermore, Texas has become a key battleground state for voting rights. Recent State legislation and practices have created an environment of voter suppression like no other. . . .
>
> I have had the pleasure of working recently with [the petitioner]. . . . I have been most impressed with his ability to translate his cultural understanding of Latino communities into successful coalition building, voter education, leadership development and actual voter registration and turnout. His insistence on the need to create a movement that transcends individual programs led him to coordinate a most successful voter education and turnout program for the Primary Elections in Texas. He has also registered Latino voters at an impressive rate and established partnerships with key institutions like that have already led him to succeed where others have failed. [The petitioner] is also actively challenging

> voter suppression efforts in Texas by leading in filing an [*sic*] regarding the Texas Voter Id Law and becoming witnesses in a separate lawsuit challenging voting practices in the state. That [the petitioner] was called as an expert witness in this lawsuit is evidence of his preeminence in the field of voter advocacy.
>
> . . . [The petitioner's] organizing background, formal education and concrete experience in civic engagement within the Latino community . . . place his advocacy influence in a far more superior position than that of other advocates because [the petitioner's] brainchild, a civic engagement model that effectively engages a stubbornly-difficult population, works. And it works because it actually incorporates its constituency into the political infrastructure rather than simply delegating them to the fringes of the voting rolls.

Ms. s letter provides specific data with respect to voting in Texas, but her statements regarding the petitioner are general, and she cites no sources to support claims comparing the efficacy of the petitioner's work to that of other activists in comparable positions.

president of stated:

> While [the petitioner's] work will be localized in Texas, the civic participation models that he has developed will form the basis of our programs across the nation.
>
> [The petitioner's] civic engagement model is unique because it engages the community organically by taking into account not only their interest in voting, but also the cultural, social, and political factors that inhibit Latinos from voting. . . .
>
> Recently, for example, [the petitioner] led an effort to get out the vote during the May 2012 Primary Elections in Texas. [The petitioner] generated the second highest voter turnout in the county. His district went from being the worst performing district in the County to number two, which was a remarkable achievement. . . . is already implementing some of the elements of this program – particularly the recruitment of key neighborhood Latino leaders – in the other five states where we have operations, and will incorporate in a timely fashion culturally relevant elements according to peculiarities of each state.
>
> Furthermore, for the past five months, [the petitioner] has been assisting us in implementing this model and his direct efforts have already positioned as an advocate against efforts that would negatively and disproportionately impact minorities, particularly the Latino community. As a result of his activities, [the petitioner] has become a well-recognized expert in the electoral field and has been asked to testify in the Voting for America litigation challenging restrictive voter registration practices in the state of Texas.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The petitioner filed the Form I-140 petition on December 29, 2011; 's letter is from six months later, June 27, 2012. The assertion that the petitioner has implemented his model "for the past five months," therefore, does not show such implementation at the time of filing. (The petitioner's earliest submissions, discussed in the AAO's first decision, indicated that the petitioner was "developing" such models.) Similarly, the results of a primary election in May 2012 do not retroactively demonstrate eligibility.

Another issue with the election results is a lack of evidence to support the witnesses' claims. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). For instance, the two witnesses quoted above indicated that the petitioner testified as an expert witness in litigation, but the record does not document the litigation; the nature of the petitioner's testimony; the effect of that testimony on the outcome of the litigation; or the circumstances that led to the petitioner's engagement as an expert witness. Also, there is no evidence of when the petitioner acted as a witness in this way; activity after the filing date, as explained above, does not establish eligibility.

Texas director of civic engagement for the stated: "In a very short time, [the petitioner] has started a movement that is already having a ripple effect across Texas and the Nation." Like the previous witness, Ms. focused her comments on the petitioner's work during the 2012 primary election that occurred after the petition's filing date.

The materials submitted in the petitioner's second response to the RFE emphasize anecdotal, uncorroborated accounts of events after the petition's filing date. As such, these materials would not have affected the outcome of the AAO's earlier appellate decision. For this reason, the AAO will dismiss the petitioner's motion.

The petitioner's motion does not address a second ground for denial identified in the December 2012 dismissal notice. The AAO may identify additional grounds for denial beyond what the Service Center identified in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In its December 2012 dismissal notice, the AAO stated that the petitioner had shown that he holds an advanced degree, but not that his intended occupation meets the regulatory definition of a profession. The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines a profession as one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Section 101(a)(32) of the Act does not list the petitioner's intended occupation, and the petitioner did not establish that his occupation requires at least a baccalaureate degree. The AAO stated:

> It may well be that the petitioner's intended position requires a bachelor's degree, but the record does not contain sufficient evidence to support such a finding. Therefore, the petitioner has not established that his occupation qualifies as a profession. This omission is, by itself, sufficient to prevent approval of the petition, and therefore it presents an additional ground for denial.

(Footnote omitted.) On motion, the petitioner has failed to address this determination. The petitioner has, therefore, effectively abandoned the issue by failing to address it. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2. (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998). *See also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff abandoned his claims as he failed to raise them on appeal to the AAO).

The assertions offered on motion do not contest the AAO's separate conclusion regarding the petitioner's eligibility for the classification he seeks. The motion, as filed, does not show that the AAO should have withdrawn the director's decision and approved the petition.

For each of the independent and alternative reasons discussed above, the petitioner has not established that the decision was based on an incorrect application of law or USCIS policy, or that the decision was incorrect based on the evidence of record at the time of the initial decision. Thus, the motion does not meet the regulatory requirements of a motion to reconsider at 8 C.F.R. § 103.5(a)(3). The regulation at 8 C.F.R. § 103.5(a)(4) therefore requires dismissal of the motion.

ORDER: The motion is dismissed.